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No. 86-1057

IN THE
Supreme Court of the United States
OCTOBER TERM, 1986

DRUMMOND COMPANY, INC.,
Petitioner,
v.

DONALD P. HODEL,
SECRETARY OF THE INTERIOR,
Respondent.

Petition for a Writ of Certiorari to the United States Court of Appeals for the District of Columbia Circuit

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REPLY BRIEF FOR THE PETITIONER

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March 17, 1987

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TABLE OF CONTENTS

	Page
TABLE OF AUTHORITIES	ii
A. THERE IS A CLEAR SPLIT BETWEEN THE CIRCUITS	2
B. THE SPLIT BETWEEN THE CIRCUITS WILL REMAIN UNTIL THIS COURT RESOLVES IT	4
CONCLUSION	5
APPENDIX	
Rev. Rul. 86-96, 1986-32 I.R.B. 5	1a
United States v. Troup, Civil Action No. 84-6079, bench opinion (transcript dated April 25, 1986, 184-188)	2a

TABLE OF AUTHORITIES

Cases:

A.J. Taft Coal Co., Inc. v. United States, 605 F.Supp. 366 (N.D. Ala. 1984), *aff'd without opinion*, 760 F.2d 279 (11th Cir. 1985)	2
United States v. Brook Contracting Corp., 759 F.2d 320 (3rd Cir. 1985)	2
United States v. Devil's Hole, Inc., 747 F.2d 895 (3d Cir. 1984)	3
United States v. Troup, No. 86-1409 (argued Jan. 21, 1987)	3
United States v. Troup, Civil Action No. 84-6079, bench opinion (transcript dated April 25, 1986, 184-188)	3, 4

Statutes:

Surface Mining Control and Reclamation Act of 1977:	
30 U.S.C. § 1232(a) (1982)	1

Miscellaneous:

American Society for Testing and Materials (ASTM) Standard D388-77	2
Rev. Rul. 86-96, 1986-32 I.R.B. 5 (Aug. 11, 1986)	2

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REPLY BRIEF FOR THE PETITIONER

In its petition, Drummond Company, Inc. (hereinafter Petitioner) seeks review of a decision by the District of Columbia Circuit that upheld regulations promulgated by the Secretary of the Interior pursuant to § 402(a) of the Surface Mining Control and Reclamation Act of 1977 (SMCRA), 30 U.S.C. § 1232(a), which, contrary to the plain meaning of that Act, impose reclamation fees on water added to coal after it is mined and other materials that do not constitute "coal." Drummond demonstrated that this is an issue of national significance [1]

[1] As Drummond noted in its petition, the question whether the term coal includes excess moisture has significance beyond the reclamation fee program administered under SMCRA. On August 11, 1986, the Internal Revenue Service adopted Revenue Ruling

and that there is a clear split between the District of Columbia and the Third Circuits over the legality of the Secretary's regulations.

In its response, the Government claims that the court below acted properly because the SMCRA permits the Secretary to assess fees on "coal produced," a term that it argues is vague and thus susceptible to agency interpretation. According to the Government, the Secretary may assess reclamation fees not only on coal but also on water and other non-coal materials. But as Drummond demonstrated in its petition, the Government and the court below have missed the crucial point. As we have shown, even if there is ambiguity as to when and where coal is deemed "produced," the Secretary clearly is limited by SMCRA to assessing fees on "coal."

A. THERE IS A CLEAR SPLIT BETWEEN THE CIRCUITS

The Government does not deny that the decision below cannot be reconciled with the Third Circuit's decision in *United States v. Brook Contracting Corp.*, 759 F.2d 320 (3d Cir. 1985). In *Brook*, the court found that as a matter of law "coal" produced by surface coal mining means combustible coal that could qualify as such under ASTM standards[2] and that the Secretary's regulations were invalid to the extent that they assessed fees on materials other than combustible coal. Pet. App. 78a. In its ruling below, the District of Columbia Circuit upheld the identical regulations at issue in *Brook*.

86-96, 1986-32 I.R.B. 5, which implements the Eleventh Circuit's opinion in A.J. Taft Coal Co., Inc. v. United States, 605 F. Supp. 366 (N.D. Ala. 1984), *aff'd without opinion*, 760 F.2d 279 (11th Cir. 1985), authorizing deduction of excess moisture for purposes of calculating payments to the Black Lung tax fund. A copy of the IRS Revenue Ruling is appended to this Reply. App. 1a.

[2] American Society for Testing and Materials (ASTM) Standard D388-77.

The Government now argues that this Court should deny *certiorari* in order to permit the Third Circuit to resolve a supposed conflict between the Third Circuit's decisions in *United States v. Devil's Hole, Inc.*, 747 F.2d 895 (3d Cir. 1984), and *Brook* in a manner that "may well bring the Third Circuit into agreement with the D.C. Circuit's position" in *Drummond*.[3] But there is no basis for the Government's speculation that a decision by the Third Circuit in *United States v. Troup*, No. 86-1409 (argued Jan. 21, 1987), would resolve the direct conflict between the District of Columbia and Third Circuits concerning the validity of the rule at issue in this case. Instead, there is every reason to believe that a Third Circuit decision in *Troup* will be consistent with that circuit's earlier decisions in *Brook* and *Devil's Hole*.

The district court's decision in *United States v. Troup*, Civil Action No. 84-6079, bench opinion,[4] demonstrates that *Devil's Hole* and *Troup* are both consistent with *Brook* and that therefore rejection of *Brook* is unlikely to occur on appeal. As the district court explained in its opinion in *Troup*, which is now before the Third Circuit, decisions of the different panels in the *Devil's Hole* and *Brook* cases are in fact "reconcilable." App. 5a.

The factual question before the two panels in *Devil's Hole* and in *Brook* was whether all the material produced by the coal operators was coal on which a fee might be assessed. In *Devil's Hole*, the Third Circuit concluded, based on expert testimony, that the anthracite silt at issue there was coal, and thus subject to the reclamation fee. In *Brook* there was no expert evidence that the material at issue was coal, Pet. App. 71a, and therefore the panel, completely consistent with *Devil's Hole*, held that the material was not subject to the reclamation fee.

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[3] Brief for Respondent in Opposition 9.

[4] A copy of the unreported bench opinion (transcript dated April 25, 1986, 184-188) is appended to this reply. App. 2a.

Finally, in *Troup*, the district court held that some of the material at issue there was combustible material subject to the reclamation fee, while other material was not coal and therefore not subject to the fee.[5]

Rather than underscoring a split within the Third Circuit, the *Troup* case highlights the difference in the approach taken by the Third Circuit—which focused on whether OSM could legally assess fees on material other than coal—and that taken by the District of Columbia Circuit—which focused on whether ambiguities in the term "coal produced" authorized the Secretary to interpret the Act to impose fees on material other than coal.

B. THE SPLIT BETWEEN THE CIRCUITS WILL REMAIN UNTIL THIS COURT RESOLVES IT

The Government's argument that this Court should deny the petition for *certiorari* so that the Third Circuit can "resolve the conflict within that circuit", and its assertion that the *Troup* court "may well bring the Third Circuit into agreement with the District of Columbia's position in the instant case" is gross speculation and wishful thinking. As we have demonstrated above, and as the district court noted in *Troup*, that case, *Brook*, and *Devil's Hole* are all easily reconcilable. The Government's further assertion that the Third Circuit's letter to the parties in *Troup*, which indicates that it will withhold action on the appeal of that case until this Court has acted, demonstrates the Third Circuit's "reluctance to accept the *Brook Contracting* analysis" is outrageous and totally unsupported.

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[5] The Government's claim that the court in *Troup* held that the material at issue there was "combustible enough to qualify as coal" but that it nonetheless disapproved of subjecting that material to the fee, Brief for Respondent in Oposition at 9, is inaccurate. As noted above, the *Troup* court held that the material that qualified as *coal* was properly subject to the reclamation fee. *See* App. 5a.

Finally, assuming, *arguendo*, that the Government is correct that the Third Circuit is without jurisdiction to consider the validity of SMCRA regulations, this petition is the only opportunity this Court is likely to have to resolve the conflict between the circuits. If the Third Circuit accepts the Government's jurisdictional argument, it will not address the merits of the Government's appeal. The Government is unlikely to seek *certiorari* of a Third Circuit dismissal of *Troup* on jurisdictional grounds.

CONCLUSION

For the reasons discussed in the petition for *certiorari* and set forth above, the petition for a writ of *certiorari* to review the opinion of the United States Court of Appeals for the District of Columbia Circuit entered in this case should be granted.

Respectfully submitted,

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March 17, 1987

APPENDIX

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Section 4121.—Imposition of Tax

26 CFR 48.4121-1: Imposition and rate of tax on coal.

Coal; effect of moisture content on tonnage determination. The Service will allow a calculated reduction of the taxable weight of coal for the weight of excess moisture. Rev. Rul. 82-222 modified.

Rev. Rul. 86-96

Rev. Rul. 82-222, 1982-2 C.B. 295, holds that the federal excise tax imposed by section 4121 of the Internal Revenue Code on a producer's sale of coal applies to the full amount of coal sold by the producer. This amount was to be determined at the point of sale with no reduction for moisture content.

In *A.J. Taft Coal Co. v. U.S.*, 605 F. Supp. 366 (N.D. Ala. 1984), *aff'd without opinion*, 760 F.2d 280 (11th Cir. 1985), the court held that, for purposes of section 4121 of the Code, the term "coal" does not include water that is in excess of the coal's inherent moisture content and that is reasonably measurable.

For purposes of the tax imposed by section 4121 of the Code, the Internal Revenue Service will follow the *Taft Coal Co.* decision regarding the moisture content of coal. The Service will allow a calculated reduction of the taxable weight of coal for the weight of excess moisture, but only where the taxpayer can demonstrate through competent evidence that there is a reasonable basis for its determination of the existence, and amount, of excess moisture.

EFFECT ON OTHER REVENUE RULINGS

Rev. Rul. 82-222 is modified.

IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF PENNSYLVANIA

Civil Action No. 84-6079

UNITED STATES OF AMERICA,
Plaintiff

v.

WARREN TROUP,
Defendant

[Filed May 1, 1986]

CIVIL JUDGMENT ORDER

AND NOW, this 30 day of April, 1986, in accord with the bench opinion delivered by the Court at the close of trial held April 25, 1986, judgment is hereby entered in favor of the United States and against the defendant Warren Troup in the amount of $19,526.80.

BY THE COURT:

/s/ Ed. N. Cahn
EDWARD N. CAHN, J.

BENCH OPINION

Before the Court is the claim of the United States of America for a reclamation fee allegedly owed by the defendant, pursuant to 30 U.S.C., Section 1232 (a).

The Defendant is Warren Troup, T-R-O-U-P, who is an individual coal operator, from Ashland, Schuylkill County, Pennsylvania. Mr. Troup operates a surface coal mining business in Schuylkill County, whereby he uses a drag line to uncover pillars of coal left from abandoned uderground mines. Prior to removing the pillars of coal with the drag line, he causes blasts at the site to loosen the material.

The drag-line operator removes the spoils and places them on a separate pile. He attempts to excavate the pillars of coal and place that material on a "coal pile." While excavating the pillars of coal, rock, clay, dirt and other debris are included in the coal pile because the dragline operator is unable to eliminate that material and still reclaim the pillar of coal.

The controversy before me is highlighted by two opinions from the Court of Appeals of this Circuit. In United States versus Devil's Hole, Inc., 474 F 2d 895 (3rd Cir. 1984) Judge Gibbons held that silt sold to a public utility is subject to the reclamation fee even though the silt contained some non-combustible material. In United States versus Brook Contracting, 759 F 2nd 320 (3rd Cir. 1985), the Court of Appeals, strike that—Judge Aldisert held:

> "We therefore hold as a matter of law, that as used in the statute, "Coal produced by surface coal mining" means combustible coal that would qualify as such under ASTM Standards and excludes the weight of rock, clay, dirt and other debris in the computation of the reclamation fee.' "

In Brook, Judge Aldisert emphasized that there was no expert opinion as to whether or not the material sold

by the surface mining operator was or was not coal. In Devil's Hole a Dr. Davis testified that the silt—strike that—Dr. Davis testified that the anthracite silt is coal of anthracite rank. The government urges, therefore, that since Dr. Davis testified in this case that the material on Troup's "coal pile" was anthracite coal that the reclamation fee should be on the total tonnage Troup sold to his coal processor.

Troup, on the other hand, agrees that some reclamation fee is payable but that a subtraction must be made for "the weight or rock, clay, dirt and other debris."

The case is close and difficult. However, I think that the decision is mandated by Section 8 of Judge Aldisert's opinion in Brook. As I understand his opinion, the reclamation fee may be charged on material that: (a) is combustible; (b) that qualifies as coal under ASTM Standards; and (c) excludes the weight of rock, clay, dirt and other debris. Dr. Davis' testimony, which I accept as competent, accurate and credible, establishes that the material on the Troup coal pile is combustible and that it is defined as coal under ASTM standards. The testimony also shows that when this material is sent to the processing plant further refinement takes place whereby a process using a heavy medium is followed so that inorganic material is separated from the organic coal. This "sink and float" operation works on principles of specific gravity and the fact that the organic material is lighter than the inorganic material which sinks to the bottom of the heavy medium. Dr. Davis testified that there is inorganic material present in the purest forms of anthracite coal unless you use a dental pick to chip off very small pieces of pure organic anthracite. Consequently, the government argues that the exclusion of inorganic material from the calculus used to determine the amount of the reclamation fee should not be utilized. What the government is saying is that the exclusion ordered by the opinion of Judge Aldisert should be disre-

garded. I'm simply not in a position to disregard this directive.

It seems to me that the two opinions of the Court of Appeals are reconcilable. In Devil's Hole the reclamation fee was charged on silt which was purchased by the ultimate user. In that situation, the fact that the silt contained some inorganic material should not mean that a reduction in the reclamation fee is required for that inorganic material because the customer used all of the silt. In Brook and in the case at bar the coal processor eliminates the inorganic material before the coal is sold to the ultimate consumer. In my view, the liability of Troup as the first seller should be limited to the amount of coal that is commercially useable by the ultimate consumer. Therefore, I think that the decision that I'm making in this case is consistent with the two leading cases on this subject in this Circuit. The government is directed to prepare a judgment order for a reclamation fee in the amount of 55 percent of the fee calculated on Exhibit G-1 and submit an order to this Court on Monday, April 28, 1986. The 55 percent is arrived at by taking the percentages of recovery calculated by W. H. Morgan Coal Testing Laboratories and averaging it to 53 percent. The percentage is increased to 55 percent because as a matter of fact I find that there is the most likely percentage of useable coal on the Troup coal pile.

Now counsel I don't wish to debate this with you any further but if I made a slip of the tongue and we can correct it now I invite you to call it to my attention or if you notice anything in the opinion which you think is incorrect factually and from a check of my notes I would see that, I invite you to write me a letter with a copy to the other side and I'll consider what you say.

Is there anything further, gentlemen?

MR. KOPKO: I have nothing further. I thank you for this opportunity but simply for the record I move for the imposition of fees and costs on the government.

THE COURT: Motion is denied.
MR. KOPKO: Thank you, sir.
MR. ELLIS: Nothing further, your Honor.
THE COURT: All right. You may be excused. Have a pleasant weekend, gentlemen.
MR. ELLIS: Okay. Thanks, Judge.

(Court adjourned at 4:30 o'clock p.m.)